

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION**

ZIP TOP, LLC, AND FINELL CO., LLC Plaintiffs, v. BLUEAVOCADO CO., Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. 1:18-cv-00276-LY
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DEFENDANT BLUEAVOCADO CO.'S ANSWER

Defendant BlueAvocado Co. (“Defendant” or “BlueAvocado”), by and through its undersigned counsel, hereby responds to Plaintiffs Zip Top, LLC and Finell Co., LLC’s (collectively, “Plaintiffs”) Original Complaint (“Complaint”).

NATURE OF THE ACTION AND BACKGROUND

1. Defendant denies the allegations contained in the first sentence of paragraph 1 to the extent that BlueAvocado was not seeking a business partnership with Finell Co., LLC. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in the second sentence of paragraph 1 of the Complaint, and therefore denies the same.

2. Defendant denies the allegations contained in sentence 1 of paragraph 2. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in sentences 2–4 of paragraph 2 of the Complaint, and therefore denies the same.

3. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in sentence 1 of paragraph 3 of the Complaint, and therefore denies the same. Defendant admits the allegations contained in sentence 2 of paragraph 3.

4. Paragraph 4 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant admits the allegations contained in paragraph 4 of the Complaint.

PARTIES

1. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 1 of this section of the Complaint, and therefore denies the same.

2. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 2 of this section of the Complaint, and therefore denies the same.

3. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 3 of this section of the Complaint, and therefore denies the same.

4. Defendant admits the allegations contained in paragraph 4 of this section of the Complaint.

5. Defendant admits the allegations contained in paragraph 5 of this section of the Complaint.

JURISDICTION AND VENUE

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits the allegations contained in sentences 1 and 3 of paragraph 7 of the Complaint. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in sentences 2 and 4 of paragraph 7 of the Complaint, and therefore denies the same.

8. Defendant admits the allegations contained in paragraph 8 of the Complaint.

9. Defendant admits the allegations contained in paragraph 9 of the Complaint.

VENUE

10. Defendant admits the allegations contained in paragraph 10 of the Complaint.

GENERAL ALLEGATIONS

Rebecca Finell's Prior Experience

11. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 11 of the Complaint, and therefore denies the same.

12. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 12 of the Complaint, and therefore denies the same.

13. Defendant admits the allegations contained in paragraph 13 of the Complaint.

14. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 14 of the Complaint, and therefore denies the same.

15. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 15 of the Complaint, and therefore denies the same.

16. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 16 of the Complaint, and therefore denies the same.

17. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 17 of the Complaint, and therefore denies the same.

18. Defendant admits the allegations contained in paragraph 18 of the Complaint.

19. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 19 of the Complaint, and therefore denies the same.

BlueAvocado Products, Patents and Trademarks

20. Defendant denies the allegations contained in the first sentence of paragraph 20 to the extent that its (re)zip products encompass more than 2 types of bags. Defendant admits the allegations

contained in the second sentence of paragraph 20 to the extent that its products are made of plastic.

Defendant admits the allegations contained in the third sentence of paragraph 20.

21. Defendant admits the allegations contained in paragraph 21.

22. Defendant admits the allegations contained in paragraph 22.

23. Defendant admits the allegations contained in paragraph 23.

24. Defendant admits the allegations contained in paragraph 24.

25. Defendant admits the allegations contained in paragraph 25.

BlueAvocado's Attempt to Partner with Finell Co.

26. Defendant admits the allegations contained in paragraph 26.

27. Defendant admits the allegations contained in sentences 1 and 4 of paragraph 27.

Defendant denies the allegations contained in sentences 2 and 3 of paragraph 27 to the extent that the Non-Disclosure Agreement was not provided to and signed by Rebecca Finell on behalf of Finell Co., LLC.

28. Defendant admits the allegations contained in paragraph 28.

29. Defendant admits the allegations contained in paragraph 29.

30. Defendant admits the allegations contained in paragraph 30.

31. Defendant admits the allegations contained in paragraph 31.

32. Defendant admits the allegations contained in paragraph 32.

33. Defendant admits the allegations contained in paragraph 33.

34. Defendant admits the allegations contained in paragraph 34.

35. Defendant admits the allegations contained in paragraph 35.

36. Defendant admits the allegations contained in paragraph 36.

37. Defendant admits the allegations contained in paragraph 37.

38. Defendant admits the allegations contained in paragraph 38.

39. Defendant admits the allegations contained in paragraph 39.

40. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in the last sentence of paragraph 40 of the Complaint regarding a back-dated signature, and therefore denies the same. Defendant admits to the remaining allegations contained in paragraph 40.

41. Defendant admits the allegations contained in sentences 1 and 2 of paragraph 41. Defendant denies the remaining the allegations contained in paragraph 41.

Finell's Launch of Zip Top

42. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 42 of the Complaint, and therefore denies the same.

43. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 43 of the Complaint, and therefore denies the same.

44. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 44 of the Complaint, and therefore denies the same.

45. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 45 of the Complaint, and therefore denies the same.

BlueAvocado's Demand for Damages

46. Defendant admits the allegations contained in paragraph 46.

COUNT I – DECLARATORY JUDGMENT OF NO PATENT INFRINGEMENT

47. Defendant realleges and incorporates by reference its answers to paragraphs 1–46 above as if set forth fully herein.

48. Defendant denies the allegations contained in paragraph 48.

49. Defendant admits the allegations contained in paragraph 49.

No Infringement of U.S. Design Patent No. D753,444

50. Defendant denies the allegations contained in the first sentence of paragraph 50 to the extent that it is alleged that Defendant “may own” U.S. Design Patent No. D753,444. Defendant admits to the remaining allegations contained in paragraph 50.

51. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 51 of the Complaint, and therefore denies the same.

52. Defendant admits the allegations contained in sentences 1, 2 and 4 of paragraph 52 of the Complaint. Defendant denies the allegations contained in sentences 3 and 5 of paragraph 52 of the Complaint.

53. Defendant denies the allegations contained in paragraph 53.

54. Defendant denies the allegations contained in paragraph 54.

55. Paragraph 55 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 55 of the Complaint.

No Infringement of the allowed claims of the '475 Utility Patent Application

56. Defendant denies the allegations contained in the first sentence of paragraph 56 of the Complaint. Defendant admits the allegations contained in the second sentence of paragraph 56.

57. Defendant admits the allegations contained in the first and second sentences of paragraph 57 of the Complaint. Defendant denies the allegations contained in the third sentence of paragraph 57.

58. Defendant admits the allegations contained in paragraph 58.

59. Defendant admits the allegations contained in paragraph 59.

60. Defendant denies the allegations contained in paragraph 60.

61. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 61 of the Complaint, and therefore denies the same.

62. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 62 of the Complaint, and therefore denies the same.

63. Paragraph 63 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 63 of the Complaint.

No Infringement of the pending claims of the '511 Patent Application

64. Defendant denies the allegations contained in the first sentence of paragraph 64 of the Complaint. Defendant admits the allegations contained in the second sentence of paragraph 64.

65. Defendant admits the allegations contained in paragraph 65.

66. Defendant denies the allegations contained in the first sentence of paragraph 66 of the Complaint. Defendant admits the allegations contained in the second sentence of paragraph 66.

67. Defendant admits the allegations contained in paragraph 67.

68. Defendant admits the allegations contained in paragraph 68.

69. Defendant denies the allegations contained in paragraph 69.

70. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 70 of the Complaint, and therefore denies the same.

71. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 71 of the Complaint, and therefore denies the same.

72. Paragraph 72 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 72 of the Complaint.

COUNT II – DECLARATORY JUDGMENT OF NO TRADEMARK INFRINGEMENT

73. Defendant realleges and incorporates by reference its answers to paragraphs 1–72 above as if set forth fully herein.

74. Defendant admits the allegations contained in paragraph 74.

75. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in paragraph 75 of the Complaint, and therefore denies the same.

76. Defendant admits the allegations contained in paragraph 76.

77. Paragraph 77 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 77 of the Complaint.

78. Defendant denies the allegations contained in sentences 1, 3 and 4 of paragraph 78 of the Complaint. Defendant admits the allegations contained in the second sentence of paragraph 78.

79. Defendant denies the allegations contained in paragraph 79.

80. Defendant admits the allegations contained in paragraph 80.

81. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in the first sentence of paragraph 81 of the Complaint, and therefore denies the same. Defendant admits the remaining allegations contained in paragraph 81.

82. Defendant denies the allegations contained in paragraph 82.

83. Defendant denies the allegations contained in the first sentence of paragraph 83 of the Complaint. Defendant admits the remaining allegations contained paragraph 83 to the extent such allegations provide a written description of the parties' respective marks, but denies that the marks are different and not confusingly similar.

84. Defendant denies the allegations contained in paragraph 84.

85. Paragraph 85 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 85 of the Complaint.

**COUNT III – DECLARATORY JUDGMENT OF NO TRADE DRESS
INFRINGEMENT**

86. Defendant realleges and incorporates by reference its answers to paragraphs 1–85 above as if set forth fully herein.

87. Defendant admits the allegations contained in paragraph 87.

88. Defendant denies the allegations contained in paragraph 88.

89. Defendant denies the allegations contained in the first sentence of paragraph 89. Defendant has insufficient knowledge or information to form a belief about the truth of the allegations contained in the second sentence of paragraph 89 of the Complaint, and therefore denies the same.

90. Defendant denies the allegations contained in the first sentence of paragraph 90 of the Complaint. Defendant admits the remaining allegations contained in paragraph 90 to the extent such allegations provide a written description of the parties’ respective trade dress, but denies that the trade dress is distinguishable.

91. Paragraph 91 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 91 of the Complaint.

COUNT IV – DECLARATORY JUDGMENT OF NO BREACH OF NDA

92. Defendant realleges and incorporates by reference its answers to paragraphs 1–92 above as if set forth fully herein.

93. Defendant denies the allegations contained in paragraph 93.

94. Defendant denies the allegations contained in paragraph 94.

95. Defendant denies the allegations contained in paragraph 95.

96. Paragraph 96 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 96 of the Complaint.

**COUNT V – DECLARATORY JUDGMENT OF NO
MISAPPROPRIATION OF TRADE SECRETS**

97. Defendant realleges and incorporates by reference its answers to paragraphs 1–96 above as if set forth fully herein.

98. Defendant denies the allegations contained in paragraph 98.

99. Defendant denies the allegations contained in paragraph 99.

100. Defendant denies the allegations contained in paragraph 100.

101. Paragraph 101 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, Defendant denies the allegations contained in paragraph 101 of the Complaint.

In addition to the above, Defendant denies all claims and allegations not unequivocally admitted herein.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests as follows:

- a) That Plaintiffs take nothing by way of their Complaint and that Defendant have judgment entered in its favor;
- b) That Defendant be awarded its costs and fees incurred in defense of this action, including reasonable attorneys' fees; and
- c) Grant Defendant such other and further relief as the Court deems just and proper.

Dated: June 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, a copy of the foregoing **DEFENDANT BLUEAVOCADO CO.'S ANSWER** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by the operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Stephen A. Aguilar /s/
Stephen A. Aguilar